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January 7, 2010

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Petition for Protection from Whipsawing and Stop Settlement Payment
Order on the U.S. Tonga Route,
IB Docket No. 09-10*

Dear Ms. Dortch:

Digicel (USA), Inc. ("Digicel USA") hereby responds to the oppositions filed against Digicel USA's request for a protective order in this proceeding filed on December 15, 2009. Letters were received from counsel for REACH Services (USA) Inc. on December 24, 2009,¹ and from Verizon on December 28, 2009² opposing Digicel USA's request for limited access to the responses filed under requests for confidentiality by a number of U.S.-regulated carriers to the International Bureau's February 18, 2009 request for information from such carriers in this docket (hereinafter, "Bureau Information Request").

Both REACH and Verizon argue that their responses to the Bureau's request for information were voluntarily submitted, and that the Bureau's release of the information to Digicel USA, even pursuant to a protective order, could have a chilling effect on the Commission's future ability to obtain information on a voluntary basis.³ Both carriers further argue that the information contained in their respective submissions to the Bureau is not necessary to the Bureau's determination that Digicel USA has "arrangements" with carriers that are potentially subject to the Bureau's stop-payment orders in this proceeding, because their submissions did not name any Digicel entity as a carrier through which traffic was delivered to Tonga, either directly or indirectly. Finally, Verizon makes a third argument that, if a protective order is granted to Digicel USA, it should limit access to Digicel USA's outside counsel because a "heightened level of protection" is necessary to ensure that the disclosed information does not contribute to any carrier having an unfair competitive advantage over Verizon.

The first basis outlined above for opposition to Digicel USA's request for a protective order is clearly without merit. Although both carriers assert that they complied "voluntarily" with the Bureau's information request, in fact, as U.S.-regulated carriers, they had a legal responsibility to comply with the

¹ Letter to Marlene H. Dortch, Secretary, FCC, from Robert Aamoth, Kelley Drye & Warren, dated December 24, 2009 ("REACH Letter").

² Letter to Marlene H. Dortch, Secretary, FCC, from Katharine R. Saunders, Verizon, dated December 28, 2009 ("Verizon Letter").

³ Contrary to REACH's assertion, Digicel USA neither challenges nor concurs with REACH's assertion that its submitted information is entitled to confidential treatment.

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Bureau's request, absent a challenge to its reasonableness or relevance, neither of which was raised by any of the responding carriers. It is disingenuous for REACH to argue that the Commission's use of the term "request" rather than "order" was material to the required information production.⁴ The Bureau's "request for information" was, in fact, expressly made pursuant to its authority under the 2004 *ISP Reform Order*.⁵ In the portions of the *ISP Reform Order* relied on by the Bureau in its Information Request, the Commission explained that it would amend Section 43.51 of its Rules to restrict the information required to be disclosed by U.S. carriers relative to routes removed from the ISP, like the U.S.-tonga route. The Commission expressly reserved, however, its ability to require the production of information by regulated carriers relative to such routes in specific cases involving suspected anticompetitive behavior:

"...[W]e reserve the right to require the filing of particular contracts when presented with evidence of a violation of the "No Special Concessions" rule or of other anticompetitive behavior related to these matters on a particular route."⁶

The information "requested" by the Bureau, therefore, was "required" to be produced by U.S.-regulated carriers pursuant to the authority reserved by the Commission in issuing its *ISP Reform Order*. Every responding carrier understood this fact and none of them challenged the Commission's authority to seek production of the information, although a number asked for confidential treatment of various portions of the information supplied. Nor does REACH provide any authority in its opposition letter for its novel proposition that the Commission's ability to require information production from U.S. carriers with foreign ownership is more limited than that exercised over purely domestically owned U.S. carriers.⁷ The Bureau's agreement to provide limited access to information supplied under requests for confidentiality in response to the Bureau Information Request, therefore, can have no "chilling" effect on its ability to require such information to be produced on future occasions.⁸

Digicel USA believes the second argument raised by REACH and Verizon has greater merit. As made clear in Digicel USA's request for protective order (page 2), its understanding that the "information provided in" the present proceeding that Digicel USA has arrangements potentially subject to the stop-payment orders is found in one or more responses to the Bureau Information Request came from a conversation with the International Bureau on November 30, 2009. Digicel USA does not know which carrier or carriers responding to the Bureau's February 18, 2009 information request identified Digicel USA as having such arrangements. Therefore, its request for a protective order was initially made applicable to each of the 13 responding carriers.

⁴ REACH Letter, at 2.

⁵ International Settlements Policy Reform: International Settlement Rates, 19 FCC Rcd 5709, 5736 (2004). See identical letters from John V. Giusti, Acting Chief, International Bureau, to 13 carriers, IB Docket 09-10, February 18, 2009, at 1, n. 4.

⁶ 19 FCC Rcd at 5736-37.

⁷ REACH Letter, at 3.

⁸ See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.1d 871 (D.C. Cir. 1992), cert. denied, 507 U.S. 984 (1993).

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At this time, however, Digicel USA is prepared to amend and restrict its request to just those responses filed under requests for confidentiality in which Digicel USA is identified as being party to one or more arrangements potentially subject to the restrictions in the Bureau's stop-payment orders. Since the Bureau sent its November 19, 2009 letter to counsel for Digicel USA asserting that such "information" has been produced in this proceeding, Digicel USA is prepared to have the Bureau advise it as to which submission or submissions identified a potentially relevant role for Digicel USA. Digicel USA's request for protective order will thereafter be limited to just those responses from among the 13 submitted.⁹

Finally, Digicel USA does not accept Verizon's suggestion that the commercial information submitted in response to the Bureau's Information Request is of such a heightened degree of sensitivity as to require limitation of its disclosure under protective order to only outside counsel for the requesting party. The precedents cited by Verizon for this extraordinary limitation on a party's right to access information alleged to be relevant to it concerned commercial data that went to the heart of the producing companies' business plans, including "specific future pricing, product or marketing plans" and customer lists.¹⁰ This highly vital strategic information was made the subject of protective orders in the unusually searching contexts of merger transactions that were submitted for Commission review and consent.

The information disclosed in response to the Bureau's Information Request is not of the same core strategic quality to the disclosing parties as that addressed in the extraordinary protective orders relied on by Verizon. The requested data includes information on the disclosing carriers' direct or indirect traffic arrangements in Tonga, the settlement rates employed in those arrangements, and copies of operating agreements for the direct termination of traffic in Tonga. Thus, no strategic planning information or lists of customers is either requested or has been produced. Digicel USA's request that the Bureau issue a protective order allowing access to the information in question by both outside and in-house counsel and their respective staffs and consultants involved in this proceeding is reasonable.¹¹ It is also necessary to Digicel USA's ability effectively to evaluate the information produced under the terms of the requested protective order.

⁹ Digicel USA's agreement to limit its request for protective order is without prejudice to any different position that it or an affiliate might take with regard to information submitted in response to the Bureau's Information Request in the event the Bureau or the full Commission elect to launch a proceeding to expand the effect of the Bureau's stop-payment orders to traffic indirectly delivered to Tonga by means of re-file or re-origination arrangements. See *Second Order and Request for Further Comment*, DA 09-2422, released November 16, 2009, at ¶¶ 8-9. The public release of such information might be relevant to the proper evaluation and disposition of such a broadened proceeding.

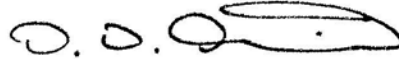
¹⁰ See *AT&T Inc. and BellSouth Corporation Application for Approval of Transfer of Control*, *Second Protective Order*, 21 FCC Rcd 7282, 7283 (Wireline Competition Bureau, 2006); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, *Second Protective Order*, 20 FCC Rcd 8876, 8877 (Wireline Competition Bureau, 2005).

¹¹ For avoidance of doubt, Digicel USA specifically requests access be permitted for the attorneys at its two law firms, Jones Day and Dorsey & Whitney, working on this matter, as well as for in-house counsel at both Digicel USA and its affiliate, Digicel (Tonga) Limited, which has a direct involvement in the Bureau's second stop-payment order in this proceeding.

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Digicel USA hereby renews its request for a protective order subject to the limitations expressly agreed to above.

Respectfully submitted,



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Counsel to Digicel (USA), Inc.

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CERTIFICATE OF SERVICE

I, Gloria Hanna, certify that copies of the foregoing Response to Oppositions to Request for Protective Order were delivered via e-mail and/or first class mail, postage prepaid, on this 7th day of January, 2010, to the following:

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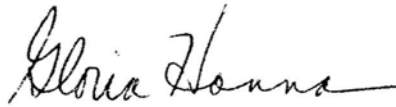
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